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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. 340

JOSEPH KESHNER,
Petitioner,

vs.

MARTIN M. WICK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

GEORGE A. SPENCER,
Guitar Building,
Columbia, Missouri,
WILDER LUCAS,
RALPH T. FINLEY,
611 Olive Street,
St. Louis 1, Missouri,
Attorneys for Petitioner.

INDEX.

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes and constitutional provision involved	5
Statement	6
Argument on reasons for granting writ	12
Appendix:	
Opinion	25
Judgment	39
Motion of appellee for leave to file, in the District Court, motion to vacate the judgment for $3,111.50 against the appellee, pursuant to Rule 60 (b) (4) of the Federal Rules of Procedure, on the ground that said judgment is void	41
Certificate of counsel	54

Cases Cited.

Apex Smelting Co. v. Burns, 175 F. (2d) 978, 981-982	19
Boeing Airplane Co. v. Aeronautical Industrial Dist., 188 F. (2d) 356 (affirming 91 F. Supp. 596)	20
Cosgrove v. Leonard Merc. & Realty Co., 74 S. W. 986, 990, 175 Mo. 100, 111	20
Feld v. Roanoke Investment Co., 27 S. W. 635, 637, 123 Mo. 603, 619	17
Horne v. John A. Herte Co., 171 S. W. 598, 184 Mo. App. 725	17

Howland v. C. R. I. & P. Ry. Co., 36 S. W. 29, 30, 134 Mo. 474, 479 ..... 18, 19

K. C., St. L. & C. R. Co. v. Alton R. Co., 124 F. (2d) 780, 783 16

Keye v. Smitherman, 225 F. (2d) 583, 594-595 18

La Cueva Ranch Co. v. Brewer, 283 Fed. 963, 964 20

National Pigments & Chemical Co. v. Williams & Co., 94 F. (2d) 792, l. c. 798 13

Osage Oil & Ref. Co. v. Continental Oil Co., 34 F. (2d) 585 14

Robbins v. Jordan, 181 F. (2d) 793 18

Rosen v. Alside, Inc., 248 S. W. (2d) (Mo. Sup.) 638, 643-644 20

Schurtz v. Cushing, 146 S. W. (2d) 591, 594, 347 Mo. 113, 119 17

Simms v. Andrews, 118 F. (2d) 803, 805-807 19

Steffen v. U. S., 213 F. (2d) 266, 272 (Pars. 12-13) 18

Sylvan Beach v. Koch, 140 F. (2d) 852, l. c. 861 ... 13, 20

Sylvania Industrial Corp. v. Lilienfeld's Estate, 132 F. (2d) 887, 893 20

Thomason v. Allen, 26 S. W. (2d) 609, 324 Mo. 1061, 1066-1067 18

U. S. v. City of Brookhaven, 134 F. (2d) 442, 446 ... 19

Windsor v. McVeigh, 23 L. Ed. 914, 93 U. S. 274 12

Statute Cited.

28 U. S. C., Section 1254 (1) 2

Textbooks Cited.

12 Am. Jur. 1031-1033, Sec. 451 16

31 Am. Jur. 167, Sec. 559 19

Rules Cited.

Rule 15 (b) of the Federal Rules of Civil Procedure.. 18
Rule 54 (c) of the Federal Rules of Civil Procedure 3, 5, 15, 17
Rule 60 (b) (4) of the Federal Rules of Civil Procedure 2, 4, 21
Rule 73 (b) of the Federal Rules of Civil Procedure.. 5

Constitution Cited.

28 U. S. C., Constitution of the United States, Amendment V 3, 5

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OPINIONS BELOW.

The opinion of the District Court for the Eastern Division of the Eastern Judicial District of Missouri, in the case here involved, Martin M. Wick, Plaintiff, vs. Joseph Keshner, Defendant, appears in the appellant's printed record in the Court of Appeals, pages 76-82. We do not find it reported in the Federal Supplement.

The opinion of the Court of Appeals in said cause, rendered May 7, 1957, appears in the certified copy of the record of proceedings filed herewith, and is printed in the appendix hereto, and is reported in 244 F. (2d) 146.

JURISDICTION.

The judgment of the Court of Appeals was rendered May 7, 1957, and the petitioner filed in said Court of Appeals a motion for leave to file a motion in the District Court to vacate the judgment against him for $3,111.50, pursuant to Rule 60 (b) (4) of the Federal Rules of Civil Procedure, on the ground that said judgment below is void. Said motion also prays the Court to modify its opinion in the concluding paragraph thereof, wherein the Court holds that the judgment, as entered, is presumptively correct, and that even if the judgment were vulnerable to attack, as not warranted by the pleadings, the Court might assume that the pleadings had been amended to conform with the proof admitted in evidence without objection, the grounds for modifying said opinion being that the portion indicated would prejudge a motion to vacate the judgment under said Section 60 (b) (4).

Said motion was denied June 27, 1957.

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED.

1. The first question presented is whether or not the judgment rendered by the District Court for $3,111.15, against the petitioner, defendant below, is void, and should be treated as a nullity, on the ground that the complaint, in Count II thereof for breach of contract, makes no reference to the agister's lien judgment, nor does it allege a breach of the contract for the feeding, breeding and care of the cattle, nor does said Count II allege or pray for any damages for breach of contract, based on overcharges in the account for the breeding, feeding and care of the cattle. Having found for the defendant on

every allegation of fraud and misrepresentation alleged as grounds of action in both Counts I and II, the District Court had no power or jurisdiction to render a judgment beyond the allegations of said Count II, without according to the defendant, respondent Keshner, an opportunity to be heard on said unpleaded issue, and the rendition of such judgment under the pleadings and evidence and facts in the case would deprive the petitioner of his property without due process of law, in violation of Amendment V of the Constitution of the United States (28 U. S. C., Constitution of the United States, Amendment V).

2. One of the defenses in each count was that the complaint fails to state a claim against the defendant upon which relief can be granted (R. 8, 12). Also, at the close of plaintiff's case (R. 58) defendant offered a motion to dismiss on the ground that under the facts and the law the plaintiff had shown no right to relief. The sufficiency of plaintiff's case was also attacked by motion at the end of all of the evidence, on the ground that under the facts and the law the plaintiff had shown no right to relief (R. 75-76). Conceding that under Rule 54 (c) in a proper case a plaintiff is entitled to judgment, whether demanded in the pleadings or not, this does not authorize the Court to give relief to which the plaintiff is not entitled. In this case defendant offered in evidence a letter written by plaintiff to defendant, Defendant's Exhibit B, which is an unequivocal rescission of the contract relied on in Count II, including the agreement with reference to keeping, breeding and feeding the cattle. All the evidence shows that the plaintiff also refused to pay the bill involved in the agister's lien suit.

3. A third question presented is that if the District Court, without pleadings or proof, went beyond the record and theory of the parties at the trial in rendering the judgment for $3,111.50 against defendant, as set forth in

the preceding paragraphs 1 and 2, could the Court of Appeals avoid the consequences of the unwarranted act of the District Court by assuming that the pleadings were amended to conform to the proof. The petitioner claims this could not be constitutionally done, and neither the District Court nor the Court of Appeals had jurisdiction to render or approve such judgment. This is further so because under the rules permitting amendments to conform to proof, the amendment must be one that is supported by the record, and authorized by the law. In other words, the petitioner asserts that the Court of Appeals had no power to assume an amendment in a respect not supported by the law and the evidence, especially where constitutional rights are involved.

4. The fourth question presented is on the action of the Court of Appeals, which denied appellee's motion for leave to file a motion in the District Court to vacate the judgment for $3,111.50 against appellee as void for want of jurisdiction of said Court to render the same, and also to modify its opinion, so far as it prejudges any attack upon the judgment of the District Court in this cause under Rule 60 (b) (4) of the Federal Rules of Civil Procedure, and to stay the judgment aforesaid, until determination of such motion to vacate.

5. A fifth question is presented as to the collateral attack made by the Court on the agister's lien judgment. It is submitted that under the law and decisions of Missouri, such a judgment could not be collaterally attacked, so far as the amount recovered in that suit is concerned, and so far as the res and the proceeds of sale are concerned, and the judgment of the District Court was rendered without jurisdiction to do so, and the Court of Appeals had no jurisdiction to affirm the same.

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED.

28 U. S. C., Rule 73 (b) of Federal Rules of Civil Procedure:

"(b) Notice of Appeal. The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part thereof appealed from; and shall name the court to which the appeal is taken. * * *"

28 U. S. C., Constitution, Amendment V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation."

28 U. S. C., Rule 54 (c) of Federal Rules of Civil Procedure:

"(c) Demand for Judgment. * * * Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

STATEMENT.

This action was brought by Martin M. Wick, Plaintiff, against Joseph Keshner, Defendant, in the District Court for the Eastern Division of the Eastern District of Missouri by complaint in two counts.

In referring in this Petition to the printed record, Appellant's record is indicated by a capital R, and reference to Appellee's supplemental record is by the abbreviation S. R.

The jurisdiction of the Court is alleged to rest upon the diversity of citizenship, the plaintiff being a citizen and resident of the State of Illinois, and the defendant a citizen and resident of the State of Missouri, and the matter in controversy, exclusive of interest and costs, is alleged to exceed $3,000.00 (R. 1).

The Answer admits the allegation as to the jurisdiction of the District Court (R. 8, 12). Both counts deal with an alleged contract for the sale by defendant to plaintiff of 15 cows at the price of $1,000.00 per head.

Count I (I-7), is based on the theory that a confidential relationship of trust existed between plaintiff and defendant on which plaintiff was entitled to rely. This arose, plaintiff alleges, because of his inexperience in the cattle business, and the considerable experience of the defendant, thereby conferring the duty of trustee on defendant as regarded plaintiff. Plaintiff also alleged that defendant represented to plaintiff that the cattle to be sold to plaintiff were for $1,000.00 per head would actually be worth $2,000.00 per head and that plaintiff would make 25% return on investment in cattle after the herd had increased to 30 in number, and that defendant would return to plaintiff the purchase money if he at any time were dissatisfied with the transaction or needed money; that the cows would be heifers and young matrons, not over 2 years of

age; that nine of the cattle delivered to plaintiff were from 7 to 11 years old; that they were, in fact, worth less than $300.00 per head, and that because of the confidential relationship existing between the parties, there was a breach of trust on the part of the defendant by so allocating such animals to plaintiff, which constituted fraud and entitled plaintiff to a refund of the $15,000.00 paid to the defendant for the cattle on February 9, 1952.

The complaint was alleged in count I, paragraph 4 (R. 3), that the defendant would keep the cattle for the plaintiff and feed, breed, and maintain the same and that the cost to the plaintiff would not exceed $200.00 per year per head, such cattle to be kept on defendant's stock farm; and it is alleged in paragraph 9 of Count I (R. 5), that upon learning the ages, characteristics and value of the cattle, plaintiff became dubious of the transaction and fearful of his investment and demanded the return of his money. In paragraph 10 (R. 5), plaintiff alleges that he had at no time acquiesced in allotment of the cattle to him and at all times repudiated and demanded the return of his investment; and that defendant did not perform and comply with his representations and that the entire transaction was a conscious and deliberate effort to obtain plaintiff's money without giving him value in return. The prayer of count I was for the return of the purchase price with interest and for punitive or exemplary damages in the amount of $15,000.00.

Count II realleges by reference the paragraphs of count I as to the terms of the sale, the representations made, but omitted the allegations with reference to the fiduciary and trust relationship. Count alleges that the agreement was breached because of the failure on the part of defendant to perform for the reasons stated in count I. In paragraph 4 of count II, the plaintiff alleges that by reason of the foregoing, the defendant breached his contract with the plaintiff, and such breach has damaged the plain-

tiff in the sum of $15,000.00, the amount invested with the defendant, which has now become lost to him. The prayer is for $15,000.00 actual damages and $15,000.00 punitive damages (R. 6-7).

The answer to Count I (Third Defense, paragraph 4, R. 8-9), alleges that the plaintiff became acquainted with the defendant prior to 1952 and that after plaintiff had advised defendant that he desired to purchase some Aberdeen Angus cattle, that defendant told plaintiff that the cost of keeping, feeding, breeding, and maintaining animals by the month would not exceed on the average $200.00 per year per head until the plaintiff could locate a farm and move the cattle; that defendant showed plaintiff 15 head of cattle that he would sell him at $1,000.00 per head and on February 9, 1952 plaintiff purchased 15 head from the group of defendant's cattle and paid for them; that thereafter during 1952 the plaintiff visited defendant's farm, discussed "his" cattle, looked at farms to purchase in the community, brought his friends to defendant's farm and showed them "his" cattle, but denies all other allegations with reference to the misrepresentations and fraud charges (R. 9-10). It is also alleged that the plaintiff, after he had visited defendant's farm and after the drop in the price of cattle, requested defendant to return his money, which defendant refused to do. Defendant also alleges that plaintiff, after requests at arious times, refused to pay for the said maintenance and breeding of the animals and that finally defendant instituted legal proceedings before a Magistrate in Montgomery County, Missouri, for the sale of the animals, for the feeding, maintenance, and breeding charges (R. 10).

The Fourth Defense to count I (R. 11-12), sets up the judgment of the Magistrate Court in Montgomery County, Missouri for $6,231.50 for the feeding, breeding, and caring for said cattle of the plaintiff, and pleads said judgment

is res judicata and a bar to the plaintiff's claim that he was not the owner of said cows and had not accepted them, and a bar to his action. The said Fourth Defense to count I is incorporated by reference as a defense to count II (R. 12-13).

At the trial, Joseph Keshner, placed upon the stand by plaintiff (R. 14), testified to his version of the contract that he sold 15 bred cows to the plaintiff for $15,000.00 (R. 14-15), and gave the chain numbers by which he identified the cows sold to plaintiff (R. 15-16). He kept the registration certificates of the cows in order to register the calves. The cows were bred to his bull, Prince Eric 5th of GE. (R. 31). He gave the dates the first 11 cows gave birth to calves, and testified that all were bred and had calves in 1952 (R. 33). An examination of the tabulation, Plaintiff's Exhibit 20 (R. 45) shows that 15 calves were born in 1952, and separately sold at the agister's lien sale, and when the cows were sold, most of them were sold with calf at side in 1953.

There was evidence pro and con on the alleged misrepresentations, which need not be repeated here, in view of the holding of the District Court.

Defendant's Exhibit E, the judgment of the Magistrate Court in the suit against Wick for payment for keeping, feeding, breeding, and caring for the cattle, was offered by defendant (R. 76), but not transcribed in full, and is incorporated in appellee's supplemental record (S. R. 35-37), and the statement of the account or petition in the Magistrate Court, Plaintiff's Exhibit 18 (R. 29), the order of publication against Wick in that suit, as a nonresident, Defendant's Exhibit B (R. 75), and Plaintiff's Exhibit 19 (R. 44) the special execution in said court, were all certified and authenticated and offered by plaintiff by stipulation between the parties, except Defendant's Exhibit B, which was offered by defendant.

There being no dispute about the records in the Magistrate Court, or concerning the service by publication, which is recited as having been made in the special execution, Defendant's Exhibit 19, the Exhibits were not set forth in full, except the statement or petition (S. R. 35-37).

An examination of the record shows that the plaintiff offered the record in the Magistrate Court for the purpose of trying to prove that there was some error in the registration certificates or pedigrees of the cows and calves (R. 15-21, 25-29). Plaintiff also tried to attack the registration of the cows and calves (R. 60-62), and endeavored to show that the cows were not bred to a particular bull, although there was no alleged agreement that said cows should be bred to any particular bull (R. 68-70).

At the agister's lien sale in the Magistrate's Court, 28 animals were sold, and 11 of the 28 were cows with calf by side sold as one animal, so that there were 39 animals sold. Two of the calves had died, leaving 13, so that there would have been 41 in all if the two had lived.

The District Court (R. 76-81) found for the defendant and against the plaintiff on the allegation of fiduciary relationship and trust alleged in the complaint, and on every charge of misrepresentation and fraud.

Then the District Court (R. 81-82), without any allegation in the complaint, and particularly in Count II on breach of contract, held that the plaintiff, Keshner, in the agister's lien suit, was entitled to recover as damages only the sum of $2,700.00 for keeping, feeding and caring for the cows, being the first item in the account (R. 29). He disregarded the care of 6 heifers and 8 bulls, and disallowed all claims for care of the calves. He also disallowed the 1952 breeding, on the theory, as stated, that the cows were to be bred free the first year, but the evidence

shows that the cows were to be sold as bred cows, and thereafter they were to be bred at $100.00 per cow per year. In this connection the defendant, in his answer in this action below (third defense, paragraph 4) (R. 9), admitted that he agreed to keep the cattle for the plaintiff at a cost that would not exceed "on the average," $200.00 per year per head.

The record shows that the defendant Keshner filed a motion for new trial on Count II and a motion to amend the findings of fact, both of which were overruled (R. 92).

The defendant, petitioner, contends that he had no opportunity to meet the unpleaded cause of action upon which the judgment for $3,111.50 is based.

The plaintiff appealed from the judgment on both Counts I and II, not specifying that he was appealing from only part of the judgment (R. 90).

The appellee directed the attention of the Court of Appeals to the fact that the judgment for $3,111.50 on Count II was beyond the pleadings and void for various other reasons. The appellee contends that the District Court had no jurisdiction to render such judgment on Count II, and that the Court of Appeals had no jurisdiction to affirm it. After the decision by the Court of Appeals the appellee, Keshner, filed a motion for leave to file a motion in the District Court to vacate said judgment on Count II, and modify the latter part of its opinion prejudging any motion or proceeding which the appellee might wish to take, but the Court of Appeals denied the motion.

ARGUMENT ON REASONS FOR GRANTING WRIT.

I.

From the earliest times, it has been held by this Court that where a Court renders a judgment in a case without giving the interested party an opportunity to be heard on the matter involved, such judgment is void.

In Windsor v. McVeigh, 23 L. Ed. 914, 93 U. S. 274, the lower Court had before it a case involving the seizure of property in rem, where a judgment had been rendered without proper notice to the interested parties. In holding the judgment void, the Supreme Court said (l. c. 277-278):

> "A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.
>
> "That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject-matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has any thing to say, why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, Appear, and you shall be heard; and, when he has appeared, saying, your appearance shall not be recognized, and you shall not be heard. In the present case, the District

Court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict, clothed in the form of a judicial sentence."

The foregoing principle has been frequently applied to cases where a judgment has been rendered which goes beyond the pleadings and issues in the case.

In Silvan Beach v. Koch, 140 F. (2d) 852, l. c. 861, Judge Sanborn, for the Eighth Circuit, said:

> "**In the absence of (1) notice to a party of the claim made against him, and (2) of a hearing or an opportunity to be heard in opposition thereto, a judgment entered upon the claim is a nullity.** (Citing many decisions of this Court.)
>
> "**A court may not, without the consent of all persons affected, enter a judgment which goes beyond the claim asserted in the pleadings.** (Citing three decisions of this Court and decisions of other Federal Courts.) * * * **A party is no more entitled to recover upon a claim not pleaded than he is to recover upon a claim pleaded but not proved.**"

In National Pigments & Chemical Co. v. Williams & Co., 94 F. (2d) 792, l. c. 798, where an issue was passed on by the Court, which was beyond the pleadings, the Court said, l. c. 698:

> "It is obvious that the controversy respecting the Stinson patent and the sale of Gelox is wholly outside the scope of the issues defined in the pleadings."

The Court eliminated the part of the judgment outside of the pleadings, and remanded the case, with instructions to modify in accordance with the opinion.

In Osage Oil & Ref. Co. v. Continental Oil Co., 34 F. (2d) 585, where the trial Court had undertaken to adjudge matters outside of the pleadings, the Court, as to such matters, said, l. c. 588:

> "Issues not raised by the pleadings cannot be determined. U. S. v. Goldstein (C. C. A. 8), 271 F. 838, 845. A decree, in so far as it undertakes to decide issues not made by the pleadings, is void (citing many cases). A Court is without jurisdiction to pass upon questions not submitted to it for decision (citing cases). **If the Court were without jurisdiction to determine such issues at the original trial, it would seem to follow that it was without jurisdiction to reserve such issues for future determination.**"

The petition in this case nowhere indicates any basis for damages for breach of the contract in question. There is nothing in the pleadings or evidence which indicates that the plaintiff intended or that the defendant was apprised that the plaintiff was seeking to recover damages for an alleged excess or mistake in the agister's lien judgment. However, in this case, the District Court is the one that made the mistake. How could the District Court have a right to say, without evidence, that a contract, which says a defendant shall charge not exceeding $200.00 per head per year for keeping, feeding, breeding and caring for the cattle, means that the defendant must feed the cattle separately and keep a separate record of what each animal costs to maintain? The defendant pleaded in his answer (R. 9) that the agreement was that the cost of feeding, keeping, breeding and caring for the cattle would not exceed "on the average" $200.00 per year per head, and denied that the contract was as pleaded by the plaintiff, and the Court, for some unknown reason, sought to make defendant pay more for the upkeep of the cattle than the plaintiff would be required to pay under the theory of the said District Court. The District Court was himself mis-

taken in the facts when he said that Keshner had no right to charge $1,500.00 for the 1952 breeding, because the 1952 breeding was for 1953 calves. The 1952 calves were born between March 8, 1952, and December 15, 1952. The cows were therefore bred in 1951, and were properly sold as bred cows. The 1953 calves, for the most part, were already born when the judgment in the agister's lien suit was rendered (Plaintiff's Exhibit 20, R. 45). The Court committed a gross wrong when he gave judgment without permitting the defendant to offer evidence to show what the terms of the contract meant in the cattle business.

Furthermore, the Court erred in taking upon himself, without evidence, to say that the provision that the cost of keeping, feeding and breeding of the cattle applied only to the cows. That is a very unreasonable construction, because the calves and yearlings and two-year-old bulls and heifers require more attention, care and expense, as a rule, than do the adult cows. Again, the contract was for an indefinite duration, and under the construction of the contract given by the Court, when the herd reached sixty or more, Keshner would still have to charge only $200.00 per year per head for 15 cows. The parties manifestly intended that Mr. Keshner should be paid for the upkeep of the calves and offspring of the cows, as well as for the cows themselves.

These considerations show how unreasonable and arbitrary the act of the Court was in rendering a judgment beyond the pleadings, on a theory never presented at the trial, and therefore depriving the defendant of his property without due process of law. Such judgment is therefore void, and should be ordered vacated by this Court.

II.

It is true that under Rule 54 (c), the lack of a prayer is no ground for denying a plaintiff the right to a judgment on a cause of action stated, but a judgment must

be supported by a cause of action stated in the pleadings. However, under some circumstances, the lack of a prayer may indicate the intention of the pleader, or a prayer for one thing may indicate that the pleader is not relying upon something else.

K. C., St. L. & C. R. Co. v. Alton R. Co., 124 F. (2d) 780, 783.

In this case, the record fails to show any mention of any claim by the plaintiff that the contract was breached by obtaining judgment in the Magistrate Court for the recovery of the cost of feeding, breeding and keeping plaintiff's cattle. But the plaintiff had no cause of action, because by his letter of December 19, 1952 (Plaintiff's Exhibit B, R. 42-43), he unequivocally notified the defendant that he had rescinded the sale, and was not interested in anything except the complete refund of his investment. Another letter from plaintiff (Defendant's Exhibit D, R. 43) declares the sale void. The plaintiff had also breached the contract by failure to pay for the keep of the cattle.

In 12 Am. Jur. 1031-1033, Sec. 451, the other necessary prerequisite to a rescission, namely, a restoration of the defendant to the status quo, is stated as follows:

> "**The very idea of rescinding a contract implies that what has been parted with shall be restored on both sides.** Releasing one party from his part of the agreement and excusing him from making the other party whole do not seem agreeable to reason or justice. **Hence, the general rule is that a party who wishes to rescind an agreement must place the opposite party in status quo.** An attempted restoration of the status quo **is an essential part of rescission of a contract.** • • • Ordinarily, before an action at law based upon rescission of a voidable contract can be maintained, such restitution of what the plaintiff has received by

virtue of the contract as is necessary to put the other party back in the position he was in prior to the making of the contract must be made or attempted."

This has always been the law in Missouri.

Schurtz v. Cushing, 146 S. W. (2d) 591, 594, 347 Mo. 113, 119;

Feld v. Roanoke Investment Co., 27 S. W. 635, 637, 123 Mo. 603, 619.

A party cannot affirm a contract in part and repudiate it in part. He cannot accept its benefits on the one hand, while he shirks its disadvantages on the other. He cannot play fast and loose in the matter.

Schurtz v. Cushing, 146 S. W. (2d) 591, 347 Mo. 113, 119;

Horne v. John A. Herte Co., 171 S. W. 598, 184 Mo. App. 725.

Rule 54 (c), therefore, could have no application, since that rule contemplates that the evidence shows that the plaintiff is entitled to recovery.

The same is true of another defense fully established by the evidence, namely, that the agister's lien suit is res judicata. Defendant pleaded in his answer (R. 11-13, Fourth Defense) the agister's lien judgment as res judicata in this case as to the ownership of the cows, which is what the Courts refer to as status or title, which is adjudicated by a suit in rem. Defendant did not know at that time that the Court would go beyond the pleadings and undertake to readjudicate matters decided by the agister's lien judgment. The plaintiff had never done so, and we submit that the Court had no power to try an issue which neither parties intended to try, and which defendant had no opportunity to try.

In its opinion, the Court of Appeals held (a) that the appellee, not having appealed, could not attack the judgment below, and (b) that if the petition be not sufficient to authorize the judgment awarded, the Appellate Court could assume that the pleadings had been amended to conform to the proof.

Even where amendments are allowed, it is the proper rule and practice to grant the defendant a continuance to meet the new issues and evidence thereunder.

Robbins v. Jordan, 181 F. (2d) 793.

But the rule authorizing amendments to conform to the evidence is applicable only when an issue has been tried by express or implied consent of the parties.

Keye v. Smithermen, 225 F. (2d) 583, 594-595.

There is no evidence showing an express or implied consent to try the issue put into the case by the District Court. Furthermore, it is a rule, sustained by many cases, that an amendment cannot be allowed to sustain an award inconsistent with that expressly prayed for.

Steffen v. U. S., 213 F. (2d) 266, 272 (Pars. 12-13).

But if an amendment be allowed to conform to proof, it would have to be an amendment authorizing a collateral attack upon the agister's lien judgment. This cannot be done.

Howland v. C. R. I. & P. Ry. Co., 36 S. W. 29, 30, 134 Mo. 474, 479;

Thomason v. Allen, 26 S. W. (2d) 609, 324 Mo. 1061, 1066-1067.

We assume the ruling of the Court is based upon Rule 15 (b), 28 U. S. C., Federal Rules of Civil Procedure,

which provides for amendments to conform to the evidence. There was certainly no express or implied consent shown by either party to relitigate the amount of the judgment in the agister's lien suit. To do that, the plaintiff would have had to make a direct attack upon that judgment in his petition. He could not have attacked the judgment collaterally.

Howland v. C. R. I. & P. Ry. Co., 36 S. W. 29, 30, 134 Mo. 474, 479;
31 Am. Jur. 167, Sec. 559.

There is no indication in the Rule that Congress intended to deprive any party of the right to be heard on the question involved. The whole theory of the Rule is that all parties had intentionally consented to the trial of the issue in question. That is not shown by the record in this case. No case has held, so far as we have found, that pleadings can be amended to include an issue on which, as a matter of law, under the evidence, the plaintiff is not entitled to recover.

Other cases which sustain our position on this question are as follows:

Simms v. Andrews, 118 F. (2d) 803, 805-807;
U. S. v. City of Brookhaven, 134 F. (2d) 442, 446;
Apex Smelting Co. v. Burns, 175 F. (2d) 978, 981-982.

In the Simms case above cited, Syllabus 8, 118 F. (2d) 803, l. c. 897, the Court held that where evidence was common and material on certain issues in the case, the rule permitting amendments did not authorize a finding that the issue was tried on an unpleaded theory.

The injustice of an assumption of such an amendment in this case is shown by the fact that when plaintiff rescinded the contract, demanded his money back, and refused to pay for the keep of his cattle, he breached his contract, and that was long before the suit was brought in the Magistrate Court. In other words, the loss, if any,

that the defendant suffered by being forced to sell the cattle without registration certificates (see opinion of the District Court, R. 80-81), so that the cattle would not bring sufficient to pay the costs and expenses of the suit and the amount of the defendant's claim, was caused by the plaintiff's breach of the contract. It is well settled by all of the authorities that one who elects to rescind a contract cannot afterwards sue for breach of the contract.

> La Cueva Ranch Co. v. Brewer, 283 Fed. 963, 964;
> Boeing Airplane Co. v. Aeronautical Industrial Dist., 188 F. (2d) 356 (affirming 91 F. Supp. 596);
> Sylvania Industrial Corp. v. Lilienfeld's Estate, 132 F. (2d) 887, 893.

Such is the law in Missouri.

> Rosen v. Alside, Inc., 248 S. W. (2d) (Mo. Sup.) 638, 643-644;
> Cosgrove v. Leonard Merc. & Realty Co., 74 S. W. 986, 990, 175 Mo. 100, 111.

In the Boeing case, above cited, the Court of Appeals adopted the opinion by the District Court, 91 F. Supp. 596, 612-613, which covers this case like a blanket.

In Sylvan Beach v. Koch, 140 F. (2d) 852, above quoted, the Court, after stating the rules with respect to denying recovery upon a claim not pleaded, further said:

> "The foregoing rules are all fundamental and state nothing more than the essentials of due process and of fair play. They assure to every person his day in court before judgment is pronounced against him. **They cannot be circumvented by allowing amendments to pleadings to change a cause of action after judgment or by giving notice of the entry of judgment or by entertaining motions to vacate a judgment after it has been entered.**"

After the Court of Appeals had filed its opinion affirming the judgment of the District Court, which was, we think, void for want of jurisdiction of said District Court to render the same, appellee filed a motion for leave to file a motion in the District Court to vacate the judgment for $3,111.50, under Rule 60 (b)(4), 28 U. S. C., Federal Rules of Civil Procedure, and to modify its opinion in the last paragraph thereof, so far as it prejudges any attack by appellee on the judgment of the District Court in this cause, and to stay said judgment until the determination of such motion to vacate.

The Court of Appeals therefore has affirmed the action of the District Court in rendering a judgment against the petitioner without an opportunity to be heard. The authorities seem to be conflicting, and it may be that it was unnecessary to file a motion in the Court of Appeals for leave to attack the void judgment, but even if appellee should bring an independent suit to set aside said judgment, he would be confronted by the dictum and prejudging holding of the Court of Appeals. Here again the appellee would be deprived of his day in court, because on the motion below to vacate the judgment he could offer the briefs filed with the District Court by the appellant Wick and his briefs in the Court of Appeals, which clearly show that he was as much surprised as defendant was when the District Court went outside of the record to take away from the petitioner what he had recovered in the agister's lien suit, when, as a matter of fact, the District Court was mistaken when it found that the $1,500.00 for 1952 breeding was for the first breeding. The record of the cattle sold (Plaintiff's Exhibit 20, R. 45) shows that 14 calves had been born to the cows in question at the time of the sale, and their births began on March 8, 1952, and the last birth was December 15, 1952. But the record also showed that 11 of the same cows had calves by side at the time of

the sale. In other words, after the cows calved in 1952, they were rebred by the defendant, and had calves in 1953.

The Court, in its opinion, also states that since the petitioner did not appeal, he could not raise the questions he has raised. When a judgment is void because a Court has gone beyond the record and rendered a judgment, without prior notice, and without giving the defendant an opportunity to be heard, he has exceeded his jurisdiction, and the judgment is void. It cannot be validated by the Court of Appeals, and any judgment of the Court of Appeals validating it is also unavailing.

This is shown by the authorities under point I of this argument.

The opinion also holds that there was no motion to elect. The answer challenges both counts for failure to state a cause of action, and the sufficiency of the evidence was challenged at the close of plaintiff's case and also at the close of all the evidence. It would seem, therefore, that no question of election is involved.

It is said in the opinion that by agreement between the parties, the cattle were left on defendant's farm, and defendant was to board them for an indefinite period at a reasonable "rental" (sic) not to exceed $200.00 per year per cow, for which he was to be paid by the plaintiff at least once every six months or a year. This reasoning affords no basis for attacking the Magistrate judgment. Plaintiff's complaint alleges that the defendant told plaintiff that profit from the investment would not be forthcoming until the herd allotted to him approximated 30 in number; "that cost of keeping, feeding, breeding and maintaining animals allotted to an investor would not exceed $200.00 per year per head" (R. 3). In his answer to that allegation, the defendant (R. 9) alleges that such cost of keeping, feeding, breeding and maintaining animals by the month "would not exceed on the average $200.00

per year per head" and denies all other allegations in plaintiff's complaint.

The evidence merely referred generally to the terms of the agreement to keep the cattle, beause there was no claim in the District Court as to any damages for overcharging for the keeping of the cattle. The defendant pleaded the agister's lien judgment as res judicata at least as to the title to and ownership of the cattle, and if the ownership was necessarily determined in the agister's lien suit, then the judgment was res judicata of the issues in this suit. But regardless of this matter, the agister's lien judgment is res judicata as to the res, that is, the cattle sold and the proceeds of such sale and the amount due. The Court overlooks the fact, too, that the judgment in the agister's lien suit cannot be collaterally attacked in the manner attempted by the District Court. How could defendant have made his defense on res judicata without offering the proceedings in the Magistrate Court? Offering it did not admit a claim not pleaded by plaintiff.

V.

The fifth question presented under this petition is with reference to the question of collateral attack on the agister's lien judgment. This question has been covered in our discussion under point III of this argument.

In conclusion, we submit that grave injustice has been done in this case, that the defendant has been deprived of his property without due process of law, under the Fifth Amendment to the Constitution of the United States, that the District Court had no jurisdiction to render the judgment for $3,111.50 against defendant because there was no intimation in the record or in Count II that any damages were claimed as a result of anything except the fraudulent misrepresentations alleged therein, and that the District Court, if he thought there should be a recovery under the

unpleaded grounds of damage, should have given the defendant an opportunity to show the meaning of the contract in the cattle business. If such had been done, the defendant would have in the record pertinent evidence upon which the Court could have determined the issue, and if against the defendant, defendant would have a better basis for his contentions on appeal.

The suggestion in the opinion that the defendant Keshner did not appeal and cannot attack the judgment is contrary to the authorities we have cited and to all authorities under similar facts. The lack of jurisdiction and the voidness of a judgment can be asserted by any interested party at any time, and even if the parties do not raise the question, it is the duty of the Appellate Court, itself, to consider the matter and disregard the judgment if it be void for lack of jurisdiction of the subject-matter. Furthermore, an appellee has a right to show there is no foundation for a judgment, and that the Court had no jurisdiction to render it. In this connection, the plaintiff has appealed from the whole judgment, and the Court should reverse the judgment for $3,111.50 against petitioner on plaintiff's appeal.

Your petitioner prays that a writ of certiorari be granted in order that these matters may be fully investigated and determined, in accordance with the law.

Respectfully submitted,

GEORGE A. SPENCER,
Guitar Building,
Columbia, Missouri,

WILDER LUCAS,
RALPH T. FINLEY,
611 Olive Street,
St. Louis 1, Missouri,

Attorneys for Petitioner.

APPENDIX.

(OPINION.)

United States Court of Appeals
For the Eighth Circuit.

No. 15,686

Martin M. Wick, Appellant,

vs.

Joseph Keshner, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[May 7, 1957.]

Emerson Baetz for Appellant.

Wilder Lucas and George A. Spencer (Ralph T. Finley was with them on the brief), for Appellee.

Before Gardner, Chief Judge, and Johnsen, Circuit Judge, and Donovan, District Judge.

Gardner, Chief Judge.

This action was initiated by the filing of a complaint containing two counts. Appellant was plaintiff below and we shall refer to the parties as they were designated in the trial court. While the complaint contained two counts there was but one transaction involved and the counts of the complaint represent two versions of that transaction.

By the first count plaintiff sought to recover damages in the amount of $30,000 based upon a breach of a duty arising from a fiduciary relationship alleged to exist between the plaintiff and defendant. It was alleged that the defendant represented that he was engaged in the business of breeding, raising, buying and selling of beef cattle and other livestock and was a man of wide experience in his vocation and held himself out as an expert in the valuation, breeding, raising, buying and selling of beef cattle and other livestock; that plaintiff, on the other hand, was a pipe organ manufacturer without experience or knowledge in the business of breeding, raising, buying or selling of beef cattle or other livestock; that at the time mentioned in the complaint plaintiff and defendant discussed the possible investment of $15,000 by plaintiff in the business of beef cattle raising operated by defendant; that by way of inducement to such investment by plaintiff, defendant represented that if plaintiff would make such an investment he might realize a 25% per annum profit on such investment and that several other persons of wealth had made similar investments with him and that defendant was anxious to expand his clientele to include persons not engaged in agricultural pursuits; that defendant represented that in the event of such investment by the plaintiff defendant would either purchase animals for him or segregate animals from the defendant's herd and that thereafter defendant would keep, feed and maintain the animals, breeding them and crediting plaintiff with the progeny and that by reason of defendant's experience he was highly skilled in the art of buying and selling cattle and that by reason of his skill plaintiff's investment would be without risk of loss; that defendant represented that profit and income on such an investment would accrue to the investor when the herd allotted the investor reached thirty in number and that the cost of keeping, feeding, breeding and maintaining the animals allotted to an investor would not exceed $200 per year per head and that

the initial expense of feeding and maintaining would be borne by defendant until the investment had attained a profitable status and that defendant would have no obligation with respect to the physical keeping of the animals; that defendant represented that he was anxious to expand his clientele to the community of Highland, Illinois, where plaintiff resided, and that if plaintiff would invest with him defendant would personally allot to him at a price of $1,000 per head cattle of an actual value of $2,000 per head and would allot him cattle described as heifers and young matrons not over two years of age with pedigrees fully warranting the sum total of plaintiff's investment; that defendant represented that it was his uniform practice to offer to return to investors or purchasers such money invested or paid in the event of dissatisfaction on their part but that defendant had never experienced dissatisfaction on their part and had never been required to refund any money but that if plaintiff were at any time dissatisfied with his investment if made, defendant would refund his entire investment; that by reason of the statements and representations made to plaintiff by defendant plaintiff was induced to and did deliver and pay over to defendant the sum of $15,000 and defendant took, received and appropriated such sum; that notwithstanding the alleged confidential relationship existing between plaintiff and defendant, defendant failed to carry out and perform the representations and inducements made and did not exercise good faith in the use and employment of the money paid him by plaintiff in that initially the defendant failed and refused to allot any animals from his herds to the plaintiff and that upon the plaintiff's demand to be shown animals allotted to him the defendant segregated fifteen cows from his herds but that one was in excess of eleven years of age, one was in excess of nine years of age, four were in excess of eight years of age and three were in excess of seven years of age and that none had a pedigree or other characteristic which would make the average value of the

allotted animals $2,000 per head or would make the total value of the allotted animals $15,000 to equal the amount of money paid defendant by plaintiff; that the animals allotted to plaintiff were of a true and actual value not exceeding $300 per head; that upon learning the ages, characteristics and value of the animals allotted to him plaintiff demanded the return of his money, which demand the defendant refused and thereafter ordered plaintiff to remove from defendant's premises the animals allotted to plaintiff; that on the failure of plaintiff to remove the animals so allotted to him defendant billed plaintiff for feed, maintenance and breeding of the animals and upon plaintiff's failure to either remove the animals or pay the bills for feeding, maintenance and breeding defendant foreclosed his agister's lien resulting in the sale of the animals; that plaintiff had at no time acquiesced in the allotment of cattle made to him by defendant but had at all times repudiated it and demanded the return of his investment; that defendant did not intend to perform and comply with the representations made to plaintiff but, on the contrary, affirmatively intended not to perform and comply with such representations. Plaintiff then demanded judgment against defendant awarding him the return of the $15,000 paid to defendant by plaintiff and punitive damages in like amount.

In the second count of his complaint plaintiff seeks to recover for breach of contract, alleging that he purchased from defendant fifteen cows for the agreed price of $15,000. He realleges the charges of fraud in the inducement, the payment of the $15,000 and the alleged agreement to refund such money at any time in the event of plaintiff's dissatisfaction. It is then alleged that in reliance on these representations plaintiff paid to defendant the agreed purchase price but that defendant in disregard of his obligations under the said contract of sale delayed in allotting any animals from his herd to plaintiff and that

when he did allot them none of the cows had a value of $2,000 as agreed nor did the total value of the animals purchased amount to $15,000 but that the actual value of the animals did not exceed $300 per head, which defendant well knew. Plaintiff therefore charged defendant with a breach of his contract from which he allegedly suffered $15,000 in damages, being the amount invested, and then realleged the charges of fraud as alleged in Count I of his complaint and asked for $15,000 additional punitive damages.

By way of answer defendant denied all allegations of fraud or misrepresentation on his part, denied that the relations of the parties were confidential, admitted that he sold plaintiff fifteen head of cows at the agreed price of $15,000 and admitted that plaintiff had paid him the purchase price therefor, but denied that there was any agreement to refund plaintiff the purchase price if he should become dissatisfied with his bargain. Defendant also admitted that he agreed that he would keep plaintiff's cattle at $200 per year per head and feed, breed and maintain them until plaintiff could move them. Defendant affirmatively alleged that after the sale had occurred and the cows had given birth to calves the cows and calves were registered by defendant for plaintiff in plaintiff's name with the American Aberdeen Angus Association. Defendant further alleged that after a drop had occurred in the price of cattle in September of 1952 plaintiff requested his money back which defendant refused to give him; that after defendant had furnished plaintiff with the registration certificates of the cattle he asked plaintiff whether or not he wished to sell the calves that had been born to these cows as he had a purchaser for them who would pay from $250 to $300 per calf, but that plaintiff would not agree to that nor did he return the registration certificates on the calves so that they could be sold. Defendant further alleged that after plaintiff demanded return of the purchase

price paid for said cattle defendant repeatedly billed plaintiff for breeding, keeping, maintaining and feeding the fifteen cows and their progeny, which demands being declined defendant finally sued plaintiff to foreclose defendant's agister's lien against the fifteen cows and their progeny and in such proceeding recovered judgment in partial satisfaction of which the cattle were sold.

The answer to the second count, in substance, alleged that there was a sale of fifteen cows for $1,000 apiece, realleged substantially all of the matters set forth in answer to Count I of plaintiff's complaint and denied the confidential relationship between plaintiff and defendant and the allegations of purported representations made by defendant to plaintiff to induce plaintiff to enter into the contract.

The two causes of action were not pleaded in the alternative but so far as appears from the pleadings plaintiff was seeking to recover money judgments aggregating $60,000. There was no motion to require plaintiff to elect on which cause of action he would proceed. The action was tried to the court without a jury. It appeared from the evidence that at all times pertinent to the issues plaintiff was a man in his thirties and manager of a pipe organ manufacturing enterprise in Highland, Illinois. The defendant, a somewhat older man, operated a stock farm devoted to the breeding, raising, selling and maintenance of Aberdeen-Angus cattle near New Florence, Missouri. The plaintiff and defendant became acquainted through a young lady, one Mary Lou O'Haran, who was one of plaintiff's employees and in the early part of 1952 the plaintiff, defendant and Miss O'Haran made a trip to Oklahoma to attend a sale of Angus cattle and at the sale purchased an Angus cow for $3,000, each of the three furnishing $1,000 of the purchase price. During the course of the trip it developed that the plaintiff, for the purpose of investment, was interested in buying some Angus cattle.

Several days after the trip to Oklahoma the plaintiff went over to defendant's farm and purchased fifteen Angus cows from defendant for $15,000, which plaintiff paid at that time. Mary Lou O'Haran was with the plaintiff at the defendant's farm when the purchase was made.

At that time the defendant pointed out to plaintiff the cattle that he was purchasing, indicating that they had on double neck chains. By agreement between the parties the cattle were left on the defendant's farm and the defendant was to board them for an indefinite period of time at a reasonable rental not to exceed $200 per year per cow for which he was to be paid by the plaintiff at least once every six months or a year. Plaintiff had little knowledge of cattle, Angus bred or otherwise.

Between February 9 and September 20, 1952, the plaintiff made several trips to defendant's farm to look at his cattle, usually in company with Miss O'Haran. The testimony also shows that shortly after the transaction in question defendant took a trip to Hawaii and that not long after his return the fifteen cows in question were registered with the American Aberdeen Angus Breeders Association in the name of plaintiff and that several calves that had been born to said cows were also registered in plaintiff's name. On September 20, 1952, defendant conducted one of his cattle sales which the plaintiff attended. After this sale at the defendant's farm the plaintiff also attended a cattle sale at or near Columbia, Missouri, and one near Kansas City, Missouri. Following these cattle sales the plaintiff concluded that the cattle he had purchased were not worth what he had paid for them, that the defendant had misrepresented the facts to him and he asked the defendant to return his $15,000, which the defendant refused.

Following some correspondence and conversation between the parties defendant finally ordered plaintiff to remove his cattle from defendant's farm, which the plain-

tiff refused to do, and thereupon defendant made a demand against plaintiff for some $6,000 for feed and breeding purposes which plaintiff refused to pay. Thereafter, defendant filed suit for an agister's lien upon which he was given judgment for $6,231.50 by a magistrate in Montgomery County, Missouri. The fifteen cows and their fourteen calves were then sold by the sheriff for $6,650 at an execution sale and after the costs and fees, totaling $838.50 were paid, the defendant received $5,811.50 on his judgment. There was no written contract between the parties. The facts will be further developed in the course of this opinion.

On the evidence produced the court found the issues in favor of defendant so far as the causes of action pleaded were concerned, but found upon the evidence admitted without dispute that plaintiff was entitled to recover $3,111.50. The court specifically found, in effect, that the parties at all times pertinent to the issues here involved were dealing at arm's length and that no fiduciary relationship existed between them and that plaintiff did not turn over to defendant the sum of $15,000 or any other sum for investment as contended by him, but that plaintiff purchased fifteen Angus cows for $15,000 and gave defendant a check for same; that Mary Lou O'Haran, an employee of plaintiff, was with plaintiff at defendant's farm the day of the sale and that Miss O'Haran resided on a farm near Highland, Illinois, and began buying Aberdeen-Angus cattle in 1950 and at the time of trial owned six females, a bull and several calves of the Aberdeen-Angus breed; that "the defendant did not guarantee to the plaintiff that he would have a 25% return on his investment and that the investment would be without risk"; that "The defendant did not represent to plaintiff that the initial costs of boarding the cattle would be carried on by the defendant until the investment had attained a profitable status by reason of the production of progeny and

the sale thereof"; and that "The defendant did not represent that the 15 cattle he would sell the plaintiff were worth $2,000 per head, but that he would sell them to plaintiff for $1,000 per head". The findings will be further developed in the course of this opinion.

On the findings the court concluded as a matter of law that plaintiff was not entitled to recover on the causes of action pleaded in his complaint but, as heretofore noted, entered judgment for plaintiff in the sum of $3,111.50. From the judgment so entered plaintiff has appealed and seeks reversal on substantially the following grounds: (1) the court erred in concluding as a matter of law that no fiduciary relationship existed between plaintiff and defendant, (2) the court erred in not concluding as a matter of law that the fiduciary relationship existing between plaintiff and defendant prohibited defendant from allotting to plaintiff cattle of a reasonable value less than the amount paid defendant by plaintiff, (3) the court erred in failing to find that the cattle allotted to plaintiff by defendant were of a reasonable value less than the amount paid defendant by plaintiff and that defendant knew they were of such value, and (4) the court erred in not finding that regardless of whether there was a fiduciary relationship between the parties there was a breach of contract by defendant in allotting cattle not reasonably worth the money paid him by plaintiff.

In the final analysis it is clear that plaintiff bottoms his right to recover on the alleged fact that there existed between the plaintiff and defendant a fiduciary relationship which required defendant to act with the utmost good faith towards the plaintiff and not to overreach him for defendant's benefit. The short answer to this contention would seem to be that the court found that no such relationship existed between plaintiff and defendant and that in the transaction here involved they acted at arm's length. This finding is, of course, presumptively correct and

should not be set aside unless clearly erroneous. Rule 52 (a), Federal Rules of Civil Procedure. It is, however, urged by plaintiff that this finding is not sustained by the evidence. It is not our purpose to restate the evidence on this question in detail. Though it may be somewhat repetitious, we observe that the evidence shows that plaintiff was a successful business man, the head and owner of a manufacturing company, and a man of substantial means and business experience who could afford to and did fly his own airplane around the country. His interest in the cattle business, as previously stated, was aroused not by the defendant but by his employee, Miss O'Haran, who had purchased from the defendant two pure-bred Angus cows at $1,000 a head in 1950 and who had attended numerous sales of pure-bred Angus cattle where these were shown. She had taken leave from her work to attend one of the cattle sales in Texas in 1951 and plaintiff discussed with her before and after her departure the buying of Angus cattle. Plaintiff went to the International Show in the Fall of 1951. Miss O'Haran was then keeping Angus cattle which she owned on her father's farm. This young woman's mother introduced defendant to plaintiff at this International Show in Chicago and plaintiff expressed his interest in cattle at that time to defendant. Early in 1952 it appeared that plaintiff, defendant and Miss O'Haran attended two sales in Oklahoma, each buying a third interest in an Angus cow costing $3,000, and cattle were discussed, resulting in an offer by defendant to sell plaintiff fifteen head of pure-bred Angus cattle at $1,000 a head. The transaction, however, was not closed at that time but plaintiff returned to defendant's farm on February 9, 1952, and again took with him Miss O'Haran in whom he had great confidence as to her knowledge of pure-bred Angus cattle. In other words, plaintiff was not relying only upon what defendant might tell him about the cattle he was buying. By the time plaintiff purchased the cattle he had attended, according to the record in this case,

three showings and sales of pure-bred Angus cattle, including the International Show in Chicago. Miss O'Haran accompanied plaintiff when defendant pointed out to plaintiff the cattle he was intending to sell him. Plaintiff was looking for an investment of surplus funds. He had the advice and counsel of his trusted employee, Miss O'Haran, who had experience in the purchase and maintenance of Angus cattle. Defendant did not seek out the plaintiff and attempt to sell him Angus cattle. The cattle in question were accessible and visible to the plaintiff and his advisor and there was no effort to prevent plaintiff from thoroughly inspecting the quality of the cattle and ascertaining their market value.

To entitle plaintiff to recover not only must it be made to appear that he in fact relied upon the alleged misrepresentations of the seller, that he had a right to rely thereon, and that he was induced thereby to make the purchase, but it is generally held that where the buyer has an opportunity equal to that of the seller to investigate and ascertain the truth or falsity of the seller's representations with respect to the property, he has no right to rely upon the representations and cannot, in the absence of actual fraud on the part of the seller, avail himself of them. As said in **Dickinson v. Bankers Life & Casualty Company**, Mo., 283 S. W. 2d 658, cited with approval in **Woolfolk v. Jack Kennedy Chevrolet Company**, Mo., 296 S. W. 2d 511:

> "The law affords to every one a reasonable protection against fraud in dealing, but it is not an indulgent guardian which can go to the romantic length of giving protection against the consequence of indolence, folly or careless indifference to the ordinary and accessible means of information."

The court in the instant case therefore correctly held that no relationship of confidence or trust arose as a result of the dealings between plaintiff and defendant.

The suggestion that defendant selected the animals the plaintiff was buying is not borne out by the record. The record discloses that defendant merely pointed out which of the cattle he in fact owned which were the subject of the sale. This was necessary because other cattle in the herd belonged to other parties and no one else present had sufficient knowledge to point out which of the cattle were the subject of sale. Where, as here, the parties dealt at arm's length defendant might properly commend the property he was selling without being guilty of fraud or misrepresentations. This is commonly accepted as trade talk, seller's statements or puffing, and a statement as to value is universally held to be a representation as to which the doctrine of caveat emptor applies. It must also be borne in mind that there was testimony that the cattle purchased by plaintiff were worth $1,000 per head and the court specifically found that the proof did not establish that the cattle were not worth that amount and on this issue the burden of proof was on the plaintiff.

Plaintiff in his complaint charged the defendant with various alleged misstatements of fact and various alleged fraudulent acts and testified to such statements and acts. As to these it is significant that the court on conflicting evidence specifically and categorically found in favor of defendant. This is illustrated by the following findings:

"14): * * * the defendant did not guarantee to the plaintiff that he would have a 25% return on his investment and that the investment would be without risk.

"15): The defendant did not represent to plaintiff that the initial costs of boarding the cattle would be carried on by the defendant until the investment had attained a profitable status by reason of the production of progeny and the sale thereof.

"16): The defendant did not represent that the 15 cattle he would sell the plaintiff were worth $2,000 per head, but that he would sell them to plaintiff for $1,000 per head."

We are convinced that in finding in favor of defendant and against the plaintiff on the two causes of action set out in plaintiff's complaint the court committed no prejudicial error and the judgment in that regard is therefore affirmed.

It remains to consider the contention of defendant that the judgment in favor of plaintiff for $3,111.50 is unwarranted and void. Defendant is the appellee and he took no appeal from any part of the judgment. He was the successful litigant so far as the two causes of action pleaded in plaintiff's complaint are concerned. Not having filed a cross-appeal he cannot be heard to question the legality of the judgment as entered, nor can he allege error in its entry. **Peoria Ry. Co. v. United States**, 263 U. S. 528; **Devine v. Zimmerman**, 8 Cir., 133 F. 2d 850; **United States Fidelity & Guaranty Co. v. Sweeney**, 8 Cir., 80 F. 2d 235; **Blackhurst v. Johnson**, 8 Cir., 72 F. 2d 644; **Barnsdall Refining Corp. v. Cushman-Wilson Oil Co.**, 97 F. 2d 481. In **Peoria Ry. Co. v. United States**, supra, the court said:

"The appellees can be heard before this Court only in support of the decree which was rendered."

In **Devine v. Zimmerman**, supra, the appellees attempted to urge error in the dismissal of their complaint. In denying their right so to do we said, inter alia:

"In passing it should be observed that plaintiffs also complain of this action of the court in dismissing their complaint, but not having appealed they cannot be heard to complain of the judgment as entered."

The same rule was announced by this court in all the above cited cases. Thus, in **United States Fidelity & Guaranty Co. v. Sweeney**, supra, we said:

> "Ordinarily, an appellee who files no cross-appeal is bound by the judgment as entered."

And in **Blackhurst v. Johnson**, supra, in referring to the right of an appellee who has not filed a cross-appeal to urge error we said:

> "She has, however, not appealed, and questions decided adversely to a party who has not appealed will not be considered on appeal. Appellees can be heard only in support of the decree which was rendered."

We therefore pretermit any consideration of the grounds urged by defendant in support of his contention as the matter is not properly before us. The judgment as entered is presumptively correct and even if the part of the judgment now complained of by defendant were vulnerable to attack had he filed a cross-appeal on the ground that it was not warranted by the pleadings we might still, in support of the judgment, assume that the pleadings had been amended to conform with the proof admitted in evidence without objection. The judgment here complained of must therefore be sustained. It results that the judgment as entered is affirmed in its entirety.

(Judgment.)

United States Court of Appeals for the Eighth Circuit.

No. 15686. September Term, 1956.

Tuesday, May 7, 1957.

Martin M. Wick,

Appellant,

vs.

Joseph Keshner.

Appeal From the United States District Court
For the Eastern District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and on the motion of appellee to tax cost of printing the supplemental record against the appellant, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in its entirety.

And it is further Ordered and Adjudged by this Court that the Motion of appellee to tax cost of printing the supplemental record against the appellant in this cause be, and it is hereby granted, and that Joseph Keshner have and recover against the appellant Martin M. Wick the sum of One Hundred Sixty-five and 60/100 ($165.60) Dollars, being the Clerk's fee for preparing the supplemental record for the printer in the sum of Ten and no/100 ($10.00) Dollars, and the sum of One Hundred Fifty-five and 60/100 ($155.60) Dollars, being the taxable printer's charge for printing the supplemental record, and have execution therefor.

May 7, 1957.

(Order denying Motion of Appellee for Order permitting him to file in District Court motion to set aside judgment, etc.)

United States Court of Appeals for the Eighth Circuit.

No. 15686. September Term, 1956.

Thursday, June 27, 1957.

Martin M. Wick,

Appellant,

vs.

Joseph Keshner.

Appeal From the United States District Court
For the Eastern District of Missouri.

After due consideration of the motion of appellee praying for order permitting him to file, in the District Court, a motion to set aside the judgment against him, for modification of opinion of this Court, and for remand of the cause to the District Court with directions to entertain motion by appellee to set aside the judgment, the brief of appellant in opposition to said motion and reply of appellee to brief of appellant in opposition, It is now here Ordered by this Court that the said motion of appellee, in this cause, be, and the same is hereby, in all respects denied.

June 27, 1957.

In the United States Court of Appeals
for the Eighth Circuit.

Martin M. Wick,

Appellant,

vs.

No. 15,686.
Civil.

Joseph Keshner,

Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri,
Eastern Division.

MOTION OF APPELLEE FOR LEAVE TO FILE, IN THE DISTRICT COURT, MOTION TO VACATE THE JUDGMENT FOR $3,111.50 AGAINST THE APPELLEE, PURSUANT TO RULE 60 (b) (4) OF THE FEDERAL RULES OF PROCEDURE, ON THE GROUND THAT SAID JUDGMENT IS VOID.

(Filed May 27, 1957. E. E. Koch, Clerk.)

To the Honorable Judges of the United States
Court of Appeals for the Eighth Circuit:

Now comes the appellee, Joseph Keshner, in the above enfitled cause, and respectfully represents to the Court:

I. That on May 7, 1957, this Court filed its opinion in this cause, affirming the judgment against the appellee on Count II of appellant's complaint, in the sum of $3,111.50; that in the hearing of the appellant's appeal, the appellee contended that the entire judgment, having been appealed from by the appellant, was in this Court for disposition, and that the judgment, being void upon the face of the record, was and is an absolute nullity, and should be dis-

regarded, because the relief awarded by said judgment on Count II of appellant's complaint was beyond the pleadings and prayer of said Count II. Said complaint appears on pages 1-7 of appellant's record herein, and appellee's answer to said complaint appears at pages 8-13 of said record. The judgment below appears at page 89 of said record.

II. For grounds of this motion, the appellee states:

1. That the complaint, in Count II thereof, is an action for damages for alleged breach of contract in the sale of fifteen head of cattle by the appellee to the appellant, and the grounds alleged in said count are based upon alleged false representations as to the value of the cattle and profits which appellee had made in the cattle business, and that similar profits would be forthcoming to the complainant, and also that the appellee agreed to sell and allot to appellant fifteen heifers or young matrons at the price of $1,000.00 per head, represented to be worth $2,000.00 per head, whereas there were allotted and delivered to the appellant six heifers and nine cows, of the ages of from four to eleven years.

Paragraph 4 of said Count II alleges as follows (R. p. 7):

> "**By reason of the foregoing, the defendant breached his contract with the plaintiff, and such breach has damaged the plaintiff in the sum of $15,000.00, the amount invested by the plaintiff with the defendant, which has now become lost to the plaintiff.**" (Emphasis added.)

The prayer of Count II (R. p. 27) is as follows:

> "Wherefore, the premises considered, plaintiff prays judgment against the defendant for actual damages in the sum of $15,000.00, and in addition punitive or exemplary damages in the sum of $15,000.00, and for his costs."

It is also alleged in paragraph 12 of Count I, and incorporated by reference in Count II, that the representations aforesaid were made to induce the appellant to pay over and invest with appellee the sum of $15,000.00, which contract the appellee did not intend to perform, and the entire transaction was a conscious and deliberate effort to obtain said sum of money from the appellant without giving him value in return, and that such effort being conscious and deliberate, was willful and malicious, and that the Court should award appellant punitive damages.

No reference is made in either count of the complaint to the Magistrate judgment by which the appellant's cattle were sold to satisfy the appellee's lien for the keeping and breeding of the cattle.

2. In his answer to both Counts I and II of the complaint, the appellee alleged that the complaint fails to state a claim against defendant (appellee) upon which relief can be granted. The appellee denied generally or specifically, all of the allegations as to fiduciary relationship and fraudulent representations alleged in the complaint, and each count thereof, except formal matters about which there is no dispute.

In his fourth defense, appellee set up a judgment of the Magistrate Court of Montgomery County, Missouri, in an action brought August 10, 1953, by appellee, Joseph Keshner, against appellant, Martin W. Wick, wherein the appellee obtained judgment for $6,231.50 for the keeping, boarding, feeding, caring for and training of the cows and the increase thereof, from February 9, 1952, to August 9, 1953, and said judgment is pleaded as a final adjudication of the ownership of said cows, and a bar to the complainant's action (Tr. 11-13).

3. The District Court found against the complainant on both counts, on every ground of action stated therein, finding specifically that there was no fiduciary relation-

ship between the parties, and no false representations made, and no fraud established (R. 76-81). The Court also found that under the agreement between the appellant and appellee, the cattle were left on the appellee's farm, and appellee was to keep and breed them for an indefinite period of time, at a reasonable amount, not to exceed $200.00 per cow per year (Tr, 77-81).

After finding for the appellee on both Counts I and II of appellant's cause of action, the Court further said (R. 81): "There is one further aspect to this case." Then the Court holds that there was an error in the judgment in the agister's lien suit, holding that the appellee was not entitled to recover for breeding the cows in 1952, because they were to be sold as bred cattle. The Court therefore held that the appellee was entitled to only $2,700.00 of the amount set up in the petition in the agister's lien suit, and that the appellant was entitled to recover on the second count the sum of $3,111.50, being the difference between the net proceeds of the sale and the sum of $2,700.00 (R. 81), and judgment was accordingly entered (R. 89).

4. On this appeal, the appellee, not by any claimed right as an appellant, but by reason of the fact that the judgment is void, has called the attention of the Court to the fact that the judgment is beyond the pleadings and prayer of the complaint, and should be treated as a nullity because contrary to the due process clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States of America (Appellee's Brief, pp. 22, 68-76).

The Court has denied appellee's right to so attack such judgment, on the ground that the appellee did not appeal, and cannot assert any defect in the judgment or appellant's right to recover. The defect being one going to the jurisdiction of the Court to render the judgment, and the

judgment being void, the appellee claims that the judgment can be attacked at any time wherever the issue is raised. The question of jurisdiction can be raised at any time where the judgment is in issue. This is especially true where, as here, the whole judgment is appealed from by plaintiff (appellant). Of course, appellee has not claimed, and does not claim, the right to attack the judgment for mere error.

In support of its action in denying appellee's contention, the Court has cited, on pages 14 and 15 of the opinion, various cases, including Peoria Ry. Co. v. U. S., 263 U. S. 528. The cases cited by the Court do not sustain the reasoning of the Court.

In Peoria Ry. Co. v. U. S., the Court was considering not a question of jurisdiction, but a mere matter of venue, and the Court said (263 U. S. 535-536):

> "**If there were a lack of jurisdiction in the district court over the subject matter, we should be obliged to take notice of the defect, even if not urged below by the appellee.** Mattingly v. Northwestern Virginia R. R. Co., 158 U. S. 53, 57. But the challenge is merely of the jurisdiction of the particular district. The objection is to the venue."

In Spencer v. Patey, 243 Fed. 555, l. c. 556, the Circuit Court of Appeals for the Second Circuit, after citing decisions of the Supreme Court to the effect that on every writ of error or appeal, the first question before the Court is that of jurisdiction, and that, "This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it", said:

> "Jurisdiction cannot be conferred by consent or the failure of the parties to raise the question in the trial court. * * * (Citing cases).

"'In short, if the court has no jurisdiction it cannot proceed, and when this appears, whether in the trial court or the appellate court, there is no alternative but to decline to entertain the cause. This being the law, we turn to the record and find a controversy of which the District Court has no jurisdiction upon the allegations or the proofs. The complaint alleges upon information and belief that the defendant is 'a joint stock association, with its principal business in the borough of Manhattan, city of of New York, and that the said Caleb S. Spencer is the treasurer thereof.' "'

That, of course, was said with reference to the jurisdiction of the Court over the entire cause of action.

In Street Grading District v. Hagadorn, 186 Fed. 451, 457, the Court said:

"Ordinarily no party can complain of an error procured or acquiesced in by him. (Citing cases.) But this rule cannot prevail when the trial court was without jurisdiction to enter the decree consented to. (Citing cases.)

"'It is also contended that, as no objection was made to the jurisdiction in equity on the ground that there was an adequate remedy at law, such objection was waived and cannot be raised for the first time in this court. This, we think, is untenable. The rule frequently announced and fully recognized that the existence of an adequate remedy at law cannot be raised for the first time in an appellate court is always subject to the qualification that jurisdiction over the subject-matter exists, and that the trial court is competent to grant the relief prayed for. (Citing many cases.) The doctrine of these cases is that the court for its own protection, and sua sponte, 'may prevent matters purely cognizable at law from being drawn

into chancery at the pleasure of the parties interested.' "

In this case, the record shows plainly that the Court went outside of the pleadings to give the relief on which the judgment against the appellee was rendered. The Court having no jurisdiction to do so, this Court should, sua sponte, declare the judgment void, and disregard it.

But this Court, in its opinion, apparently admitting that on the face of the record the District Court went beyond the pleadings and evidence to render the judgment in question, states that even if the sufficiency of the judgment were before the Court on appeal, this Court would assume that the pleadings had been amended to conform with the proof admitted in evidence without objection.

The first answer to this question is that there was no proof admitted in evidence for the purposes of sustaining any judgment based on a mistake in the agister's lien judgment. No evidence was offered for that purpose; it merely appears in the proceedings offered on other issues by the parties, without any intention, whatever, of attacking or defending a judgment to set aside the findings of the Magistrate Court.

In the second place, the conclusion of the Court is contrary to the authorities as to the right of this Court, in defense of the void judgment, to presume that the pleadings had been amended to support the judgment.

In Sylvan Beach v. Koch, 140 F. (2d) 852, 861-862, this Court, speaking through Judge Sanborn, said:

> "A court may not, without the consent of all persons affected, enter a judgment which goes beyond the claim asserted in the pleadings. (Citing cases.) * * * **A party is no more entitled to recover upon a claim not pleaded than he is to recover upon a claim pleaded but not proved.**

"The foregoing rules are all fundamental and state nothing more than the essentials of due process and of fair play. They assure to every person his day in court before judgment is pronounced against him. **They cannot be circumvented by allowing amendments to pleadings to change a cause of action after judgment or by giving notice of the entry of judgment or by entertaining motions to vacate a judgment after it has been entered.**"

That such is the law, is shown by the authorities cited at 140 F. (2d) l. c. 861, where Judge Sanborn said:

"In the absence of (1) notice to a party of the claim made against him, and (2) of a hearing or an opportunity to be heard in opposition thereto, a judgment entered upon the claim is a nullity." (Citing many Supreme Court and lower Federal Court cases.)

He further said (l. c. 861):

"A court may not, without the consent of all persons affected, enter a judgment which goes beyond the claim asserted in the pleadings." (Citing four Supreme Court decisions.)

If the Court could affirm a judgment entered beyond the pleadings by the mere statement that it would presume that the pleadings had been amended to conform to the proof, it would destroy the rights of a party in every case against whom a judgment had been rendered beyond the pleadings, and prevent a claim that the judgment was void on its face, or otherwise. The cases cited by Judge Sanborn in Sylvan Beach v. Koch, supra, fully sustain this conclusion, and we have found no case holding that an Appellate Court, in a situation of this kind, can assume that the complaint was amended to conform to proof in support of the judgment. The cases cited by Judge Sanborn are in addition to those cited under point III (1), page 22 of our brief on this appeal.

This is an ordinary action for breach of contract, the damages being the alleged loss of the purchase price. To permit the appellant, even if the cause were remanded, to amend for the purpose of setting aside the agister's lien judgment, would be beyond the power of the Court on the complaint in this case. Such a proceeding to set aside the agister's lien judgment would be a suit in equity, and could not be incorporated in a suit for damages for breach of a contract. This is especially true in view of the fact that the judgment in the agister's lien suit is res judicata as to the cattle and the proceeds of the sale of the cattle. The complaint below could not be allowed to overturn the judgment in the agister's lien suit. This is especially true under the decision of the Supreme Court in Howland v. C. R. I. & P. Ry. Co., 36 S. W. 29, 30, 134 Mo. 474, 479. This being true, there is no purpose in remanding the case, even under Federal Procedure Rule 60 (b) (4). The only applicable order would be to remand the case, with directions to the District Court to set aside the judgment for $3,111.50, as a nullity, and beyond the jurisdiction of the Court. This would not deprive the appellant of any right to be heard on the matter because he has no right, under the pleadings or under any possible amendment thereof, to set aside said agister's lien judgment. This is true if the judgment be void on the face of the record, which we think conclusively appears. And since no purpose could be served in remanding the case to the District Court, this Court should direct that the void judgment be vacated, if not at the appellee's suggestion, then of its own motion.

III. But if the Court should not agree with us, and is of the opinion that the matter can be remedied only by motion against the judgment as void under Federal Rules of Procedure, Rule No. 60 (b) (4), then we submit that the opinion should be modified on page 15, where it is stated that "the judgment as entered is presumptively correct and even if the judgment now complained of by de-

fendant were vulnerable to attack had he filed a cross-appeal on the ground that it was not warranted by the pleadings we might still, in support of the judgment, assume that the pleadings had been amended to conform with the proof admitted in evidence without objection." This portion of the opinion is contrary to the authorities we have cited, and all of the authorities we have been able to find on the subject. Such portion of the opinion, therefore, if any part thereof is retained by the Court, should be limited to a statement that the Court refuses to pass upon the question as to the validity of the judgment, and leave the matter open to the appellee to take such action as he may deem advisable concerning the judgment. To do otherwise would make this Court a party to the error of the trial Court in entering a judgment upon a claim not asserted, and which the complainant below could not have asserted under the law.

In this connection, we desire to call the Court's attention to certain facts as showing the injustice of affirming the judgment on the theory that the Court could assume that the pleadings had been amended to conform to the proof.

After the trial and submission below, the plaintiff below (appellant) Martin W. Wick, filed with the Court and served upon the appellee a brief in which he claimed under the first count $15,000.00 for the return of his investment, and $15,000.00 as punitive damages. The appellant, in his argument, relied, under Count I, on the fiduciary relationship alleged, and contended for his right to recover the purchase price because of the said fiduciary relationship and fraudulent representations.

Under the second count, the appellant in said brief stated that said count of the complaint constituted "an alternative presentation of the facts alleged in the first

count as a simple cause of action on contract, the theory stated being that the defendant, by allotting cattle other than of the ages, quality and value agreed upon, breached the agreement."

In the answering brief on submission, the appellee treated with the merits and also set up the agister's lien judgment as res judicata as to the status, title and facts established therein.

In appellant's reply brief, he contended that the judgment was not res judicata as to the facts in this case, except as to the property or res involved in the agister's lien suit. No mention, however, was made of any claim for any part of the proceeds of the sale under the agister's lien judgment, or any mention of relief from said judgment, or defect therein that should or could be corrected.

Throughout the trial of the case there was no claim of lack of jurisdiction of the Magistrate in the agister's lien suit, or any suggestion that plaintiff was attacking said judgment or asking any relief therefrom.

The concluding paragraph of appellant's reply brief below is as follows:

> "Under all the circumstances, we feel that plaintiff has proved a fiduciary relation, as he has alleged, entitling him to the rights of a cestui against defendant. We feel that the evidence, in the language of Judge Faris, quoted above, 'satisfies the mind and conscience' that defendant, as a fiduciary, fraudulently abused his trust and overreached the plaintiff by taking his $15,000 and giving him virtually nothing in return. **This being true, we believe that equity requires restitution to the plaintiff under Count I of his complaint, and the imposition of punitive damages by reason of the wrongful conduct of defendant. On the other hand,**

if the Court does not feel that equitable relief is called for, then we submit that relief by way of damages should be allowed under Count II, and that those damages should equal plaintiff's loss, $15,000, with additional punitive damages." (Emphasis ours.)

IV. That part of the judgment assessing damages for alleged breach of contract, in the sum of $3,111.50, based on alleged errors in the judgment of the Magistrate in the agister's lien suit, having no basis in the pleadings or prayer of the complaint, is for that reason absolutely void, and is also void for the further reason that under the evidence, by no manner of reasoning, can the sale of the cattle to satisfy the appellee's agister's lien for the keeping, care, breeding and feeding of appellant's cattle be considered as a breach of the contract for the sale of the cattle. This is so because, by various letters, beginning in September, 1952 (Plaintiff's Exhibits 9 and 11, R. 22-24), and culminating in appellant's letter of December 19, 1952 to appellee (Defendant's Exhibit B, R. 42), the appellant flatly and unconditionally rescinded the contract, particularly by the letter of December 19th, in which the appellant disaffirmed the sale of the cattle to him, and stated that he was interested only in one thing, and that was the complete refund of his money or investment (R. 42-43). The sale of the cattle and any loss resulting therefrom was the result of this breach of the contract by the appellant, himself. The District Court recited these facts in substance in its opinion and findings, and also more specifically held that the appellant disaffirmed the sale by letter of December 19, 1952, and refused to pay appellee's bill for the boarding and keeping of the cattle, and also did not return, or offer to return, the registration certificates on the cattle, so that the cattle could be sold as registered cattle, which latter fact affected the price realized at the agister's lien sale [Finding of fact 9 (R. 85-86); finding of fact No. 19 (R. 88)].

V. The judgment, being beyond the pleadings, and the record, conclusively showing that the appellee had no opportunity to show the Court, by further evidence, wherein the Court's conclusions as to the excessiveness of the judgment in the agister's lien suit were unfounded, the judgment is void, and the appellee is entitled, pursuant to Rule 60 (b) (4), by leave of this Court, to file a motion in the District Court to vacate said judgment as being void, and for the reasons herein stated, and also entitled to an order of this Court staying the mandate, for the purpose of giving appellee time to file such motion and have the same determined.

The appellee hereby offers to enter into bond to cover the costs and interest on the judgment which may accrue by reason of the delay in payment of said judgment, if the same be affirmed or not set aside, and upon such other reasonable conditions as the Court may determine.

Wherefore, the appellee prays:

1. For an order permitting the appellee to file, in the District Court, a motion to set aside the judgment against him herein, pursuant to the provisions of Rule 60 (b) (4) of the Federal Rules of Civil Procedure, upon the grounds in this motion stated, for the purpose of having said judgment for $3,111.50 vacated as void;

2. That the Court modify its opinion as in paragraph III of this motion suggested, by deleting from its opinion the portion thereof set forth in said paragraph III, so as not to prejudge appellee's motion to vacate the judgment;

3. That the cause be remanded to the District Court, with directions to entertain a motion by appellee to set aside said judgment as herein prayed, and to fix and approve a bond, to be signed by the appellee, with proper security satisfactory to the District Court;

4. And for such further orders and conditions as to the Court may seem necessary and proper.

Geo. A. Spencer,
Guitar Building,
Columbia, Missouri,
Wilder Lucas,
Ralph T. Finley,
2155 Railway Exchange Bldg.,
St. Louis 1, Missouri,
Attorneys for Appellee.

State of Missouri, } ss
City of St. Louis. }

Ralph T. Finley, being duly sworn, on his oath states that the facts stated in the foregoing motion are true, as he verily believes.

Ralph T. Finley.

Subscribed and sworn to before me this 27th day of May, 1957.

My term expires July 27, 1959.

Constance A. Wallis,
(Seal) Notary Public.

Certificate of Counsel.

I, Ralph T. Finley, a member of the bar of this Court, do hereby certify that the above and foregoing Motion is submitted in good faith, and is believed to be meritorious.

Ralph T. Finley.

[redacted]eceived two copies of the foregoing Motion on this [redacted]th day of May, 1957.

Emerson Baetz,
By Jane Scott,
Attorney for Appellant.